Our past decisions have recognized, moreover, that the First Amendment and antitrust values underlying the Commission's diversification policy may properly be considered by the Commission in determining where the public interest lies. . . And, while the Commission does not have power to enforce the antitrust laws as such, it is permitted to take antitrust policies into account in making licensing decision pursuant to the public interest standard.²⁹

The Supreme Court has observed that "the Commission might find that antitrust considerations alone would keep the statutory standard from being met". 30

Consequently, the *Opposition's* argument that the Commission is without grounds or authority to investigate the public interest implications of the Applicants' conduct and the proposed license transfer does not reflect the law. This argument only exposes the Applicants' intense desire to avoid scrutiny.

E. Because the Opposition fails to address specific and material public interest questions raised by the proposed transfer, the Commission has a solid basis to deny or impose conditions on the transfer.

SCBA has identified two critical elements of the public interest adversely impacted by the Applicants' conduct programming diversity and the health of small cable. In addition, tying and refusal to deal with NCTC raise serious anti-competitive concerns. The proposed transfer will exacerbate this impact due to increased market power and concentration of resources.

The Opposition fails to squarely address these concerns. Its main strategy is to create a smoke screen by attacking SCBA's evidence. The Opposition has failed to provide

²⁹FCC v National Citizens Committee for Broadcasting, 436 U.S. 775, 795 (1978) (emphasis added). See also, US v. Radio Corp. of America, 358 US 334, 351 (1959); National Broadcasting Co. v. U.S., 319 US 190, 222-224 (1943).

³⁰U.S. v. Radio Corp. of America, 358 U.S. 334 at 351-352 (1959) (emphasis added).

material evidence concerning the intent underlying the challenged conduct and other additional details concerning its dealings with small cable operators and NCTC. Under RKO General, the Applicants have:

an affirmative obligation to inform the Commission of the facts the FCC need[s] in order to license broadcasters in the public interest. As a licensing authority, the Commission is not expected to play procedural games with those who come before it in order to ascertain the truth.³¹

SCBA seeks the Commission's help in ascertaining the truth and protecting the public interest from the Applicants' games.

II. CAP CITIES SUBORDINATED ITS BROADCAST INTERESTS TO ITS DESIRES TO DISSEMINATE NEW CABLE TELEVISION PROGRAMMING.

A. Cap Cities Repeatedly Misstates SCBA's Position.

Cap Cities repeatedly misstates SCBA's position, attempting to divert attention from its own conduct and redirecting it to a phantom objection to retransmission consent.³² These allegations are unsupportable. Cap Cities gives not one cite to SCBA's *Petition* to support its erroneous conclusions for good reason. Nowhere in its *Petition*, does SCBA state or imply that it objects to the right of a broadcast television licensee to seek compensation for the grant of retransmission consent.

³¹⁶⁷⁰ F.2d at 229 (emphasis added).

³²For example, Cap Cities declares "Petitioners are essentially attacking the Congress' decision to grant broadcasters a retransmission consent right." *Opposition* at 4. Cap Cities continues, declaring that "[o]nce again, Petitioner's complaint is not with Capital Cities/ABC, but with the Congress." *Opposition* at 5. Cap Cities goes further by incorrectly asserting that SCBA "argue[s] that the broadcasters' duty to serve the public obliges them to grant retransmission consent -- no matter what terms may be offered by a cable system...." *Opposition* at 4.

The concern articulated by SCBA, and not responded to by Cap Cities, goes to the conflict between: (1) a broadcaster's ability to receive fair compensation for granting retransmission consent and having its signal disseminated on cable television systems;³³ and (2) a broadcaster's use of retransmission consent grants as a platform to obtain subscribers for existing, new or repositioned cable programming services. The Applicants conduct harms the public interest when a small cable operator and/or its subscribers are required to pay higher amounts for retransmission consent or are forced to forego the availability of the broadcast signal on cable. The cost of retransmission consent is artificially inflated when the market forces anticipated by Congress³⁴ are suppressed by the Applicants' immense market power. Where the broadcast/programming entity possesses this market power, market forces are suppressed and the broadcaster can value its retransmission consent above its true market value. The cost of consent will be at whatever level the cable programming portion of the broadcaster's enterprise desires to sell its programming services. The loss of self-balancing market forces and the resulting subordination of the local broadcast interest to the national cable programming interest, is not in the public interest.

³³Congress declared that "The Federal Government has a substantial interest in having cable systems carry the signals of local commercial television stations because the carriage of such signals is necessary to serve the goals contained in section 307(b) of the Communications Act of 1934 of providing a fair, efficient, and equitable distribution of broadcast services." Section 2(a)(9) of the Cable Television Consumer Protection and Competition Act of 1992.

³⁴"It is the Committee's intention to establish a marketplace for the disposition of the rights to retransmit broadcast signals; it is not the committee's intention in this bill to dictate the outcome of the ensuing marketplace negotiations." Sen. Rep. No. 102-92, 102d Cong., 1st Sess. 35-36 (1991).

B. Cap Cities ignores the abuse of market power evidenced by the cost differential imposed on small operators to obtain retransmission consent.

Conspicuously absent from Cap Cities' analysis is any discussion about the imposition of higher retransmission consent costs for smaller operators, whether the cost was paid in cash or in affiliate fees for ESPN 2. Cap Cities had ample opportunity in its two declarations to refute SCBA's contentions of disparate pricing for small operators. It did not. To the contrary, Cap Cities placed into evidence a letter allegedly from Mr. Jim Topping, President and General Manager of Cap Cities station KGO-TV in which he wrote to Lynn Simpson, a small cable operator, which shows a retransmission consent payment rate 30% higher for small operators:³⁵

You will note that the Retransmission Consent Fee structure is outlined for both three year and six year terms. Naturally, quantity discounts are available under both arrangements.³⁶

Why is it "natural"³⁷ that quantity discounts are available? Is a signal of a broadcast television station disseminated among a larger group of viewers worth less? No. Does it cost Cap Cities less per viewer to disseminate its signal via cable to a larger group of viewers than a smaller group? No. The reason quantity discounts were available, is simple;

³⁵Cap Cities conveniently, and in violation of its duty of candor before the Commission, failed to attach the cash retransmission rate schedule to its *Opposition* exhibit. This schedule which is enclosed as Exhibit A discloses a 30 percent price differential between small and large operators.

³⁶Opposition at Exhibit 1 of Exhibit B (emphasis added).

³⁷The Commission should note the tone of this letter where Cap Cities suggests that if Ms. Simpson's cable system were only 250 times larger than its present size, "naturally" she would be entitled to a discount.

Cap Cities charges higher rates for the provision of cable programming to small operators than it charges larger operators. Cap Cities admits this in its September 21, 1993 letter.

This admission confirms the issue of fact raised by SCBA concerning the pricing of retransmission consent. Cap Cities' pricing structure was controlled not by forces in the broadcast market — the forces envisioned by Congress — but by the pricing practices used by Cap Cities to sell cable television programming, and to squeeze higher profit margins from small cable.

C. Cap Cities subordinated its broadcast interest during the last round of retransmission consent negotiations.

Cap Cities again makes an erroneous argument that even if it charged smaller operators more for programming, since that conduct was not illegal, it is irrelevant to the instant proceeding. Absence of illegality or criminality is not the standard. Serving the public interest is the standard. The public interest is not served where a broadcaster measures the price it charges for retransmission consent, not on market forces, but by setting such cash prices higher than the cost of carrying a new programming service, leaving operators no choice but to carry the new programming service.³⁸ Cap Cities' admission that it charged smaller companies more for consent compellingly underscores that Cap Cities subordinated propagation of its broadcast signal on cable television systems to its desires to launch and obtain subscribers for ESPN 2.

³⁸Again, the Commission should take notice that Cap Cities was very selective in the information is placed on the record. It provided the Commission with a copy of the September 21, 1995 letter from Mr. Topping to Ms Simpson, the retransmission consent agreement and fee schedules were conveniently omitted. Nowhere on the record has Cap Cities come forward and laid out for the Commission the terms under which retransmission consent was offered.

When a broadcast licensee fixes its retransmission consent payments so that it makes carriage of the cable programming service the only feasible alternative for most cable operators, ³⁹ the broadcast licensee has subordinated fulfillment of its public interest obligation. When it makes the cost of retransmission substantially higher to small cable operators, as previously discussed, other measures of public interest are injured.

III. CAP CITIES HAS FAILED TO DEAL CANDIDLY AND MAKE FULL DISCLOSURES TO THIS COMMISSION.

A. Cap Cities has not been candid with this Commission about its post-merger intent.

SCBA's concerns about future conduct when the post-merger entity can exercise even greater market power are not mere speculation. SCBA cited incriminating statements by the CEO of ESPN, Steven Bornstein, published in Multi-Channel News.⁴⁰ Cap Cities attempts to distance itself from these comments by seeking to have them excluded from consideration, or putting a different "spin" on their alleged meaning.

Cap Cities cites a string of Commission precedent in which the Commission was reluctant to consider press reports as evidence. This precedent is inapposite for four reasons:

 SCBA cited a direct quote, not generalize speculation by reporters. In News International, PLC, 97 FCC 2d 349, 358 (1984), the Commission refused to consider general press reports alleging criminal activities as

³⁹Cap Cities even admits that no operators chose to pay retransmission fees, but most opted for carriage of cable programming. *Mallardi Declaration* at 1.

⁴⁰Petition at 5.

evidence of inadequate character where no indictments had been issued. In the instant case, the press report cited by SCBA is a direct quote by Mr. Bornstein about post-merger intent.

- 2. SCBA cited direct evidence of the post-merger intent. In Mississippi Authority For Educational TV, 79 FCC2d 577, 579, recon. denied, 84 FCC 2d 349 (1980), the Commission dismissed the press report because "[e]ven on its face, this article offers no documentation supporting a claim of employment discrimination." This was the same rationale adopted in another case cited by Cap Cities, KRPL, Inc. 5 FCC Rcd 2823, 2824 (1984). In the instant case, Mr. Bornstein's quote is strong evidence of the intended post-merger conduct and is directly relevant to the concerns raised by SCBA.
- 3. SCBA has met the requirement to file an affidavit and the Commission has unlimited ability to take official notice of matters not supported by affidavit. SCBA has supported by affidavit factual allegations that are more than sufficient to deny the applications based solely on the Applicants' prior conduct. Cap Cities does not dispute this. Nevertheless, it cites Rothschild Broadcasting, Inc., 10 FCC Rcd 7226, 7227 (1995) apparently to support the proposition that Mr. Bornstein's statement may only be brought into the record if it is supported by an

affidavit. Such an assertion is simply contrary to the Commission's statutory authority to take official notice of such other matters, including Mr. Bornstein's Comments.⁴¹ In fact, this Commission has routinely taken official notice of articles published in the trade press.⁴²

4. Mr. Bornstein's quote is a declaration against interest. The Commission must also note the unique forum in which Mr. Bornstein's statement was made. It was made to a reporter employed by Cap Cities⁴³ and published in a magazine owned by Cap Cities. Statements made by a high ranking Cap Cities employee published in a Cap Cities publication must be afforded a high level of credibility. The Commission must also recognize that the procurement of an affidavit from Cap Cities to assist in the filing of a *Petition to Deny* against Cap Cities is impossible. Cap Cities cannot be allowed to hide

⁴¹47 U.S.C. Section 309(a).

⁴²In the Applications of Lee Optical and Associated Companies Retirement and Pension Fund Trust, et. al.; For Construction Permit for a New FM Station; *Initial Decision of Deputy Chief Administrative Law Judge James F. Tierney*, MM Docket No. 83-1338, 103 FCC 2d 794, 811 (1985).

⁴³The article was written by Linda Moss, the Advertising Director of Multichannel News (see Exhibit B).

⁴⁴Exhibit B is an excerpt from the August 7, 1995 edition of Multichannel News which states that Multichannel news is owned by Chilton Publications "A Capital Cities/ABC Publishing Group".

behind their inapplicable precedent to exclude compelling evidence of Cap Cities' improper conduct.

B. Cap Cities inappropriately engages in speculation about what its own employee might have meant by his comments.

After taking SCBA to task for not obtaining an affidavit regarding Mr. Bornstein's incriminating statement, Cap Cities speculates about what Mr. Bornstein might have intended by his statement.⁴⁵ The Commission must ask why Cap Cities engages in such speculation. It certainly cannot be inaccessibility to Mr. Bornstein. Mr. Mallardi, who alleges to be "the executive in charge of both the stations and the company's cable programming interests, including ESPN**46 certainly could have directed Mr. Bornstein to clarify by affidavit what he meant by his statements. Cap Cities chose not to. The reason for this conspicuous omission should be clear to the Commission. Cap Cities is being less than candid with the Commission.⁴⁷

⁴⁵Opposition at 10 and fn 24.

⁴⁶Opposition at Exhibit A.

⁴⁷In light of the independent Department of Justice investigation of the conduct that SCBA has brought to the attention of the Commission, it is probable that Cap Cities was counseled to avoid having Mr. Bornstein make any additional comments. Cap Cities' unwillingness to have Mr. Bornstein clarify his statement is one more reason why the Commission must, at a minimum, convene hearings to allow resolution of these issues of material fact.

- IV. THE STRONG EVIDENCE SUBMITTED AND UNREFUTED BY CAP CITIES CREATES MORE THAN ADEQUATE GROUNDS FOR THE COMMISSION TO DENY THE TRANSFER. AT A MINIMUM, A HEARING MUST BE HELD ON THE DISPUTED FACTS.
 - A. Cap Cities abandoned its obligation of full disclosure and total candor before this Commission, which should result in denial of its transfer request or, at a minimum, requiring the Commission to conduct hearings to resolve substantial issues of material facts.

Licensees of this Commission have an "affirmative duty to inform the commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic, and well known." The D.C. Circuit Court of Appeals best described the duty of licensees when it stated:

[T]his means that "proceedings before the Commission are not private law suites," and that the Commission does not function "as an umpire blandly calling balls and strikes for adversaries appearing before it."***[T]he Commission must rely heavily on the completeness and accuracy of the submissions made to it, and its applicants in turn have an affirmative duty to inform the Commission of the facts it needs in order to fulfill its statutory mandate. This duty of candor is basic and well known.⁴⁹

SCBA has identified various instances where Cap Cities, through lawyerly legerdemain has been less than candid with the Commission. Whether with respect to its pricing of cable television programming, its conduct in retransmission consent negotiations, or the plans of Mr. Bornstein, Cap Cities attempts to establish smoke screens and diversions to keep the Commission off track.

SCBA has been verbally informed by a Justice Department investigator that the Antitrust Division is conducting an investigation of, among other things, the program pricing

⁴⁸RKO at 232.

⁴⁹Id at 232.

and retransmission consent issues raised by SCBA in its *Petition*. Has Cap Cities notified this Commission or the parties to this proceeding of this investigation? Not to the knowledge of SCBA. Failure to notify the Commission of a Justice Department investigation of conduct which is the issue in a license matter before the Commission is strikingly similar to the conduct of RKO General when it failed to notify the Commission of a concurrent SEC investigation of its business practices. This lack of candor resulted in the non-renewal of RKO General's licenses. This Commission should remind Cap Cities of their obligation to keep this Commission and all parties fully and timely informed of the progress of such investigations on the record.

The courts have confirmed that lack of candor, in and of itself, is grounds for denial of a transfer application.⁵⁰ Even Cap Cities' erroneous defense that the allegations raised by SCBA are not relevant does not provide protection as "the fact of concealment may be more significant than the facts concealed."⁵¹

B. Cap Cities has failed its statutory burden to demonstrate that the proposed transfer is in the public interest and must result in denial of the application, or a bare minimum, requires the Commission to conduct hearings to resolve material issues of fact.

A petitioner seeking a denial of an application for a license transfer must initially set forth sufficient specific allegations of fact showing that "...a grant of the application would be prima facie inconsistent with [the public interest, convenience, and necessity.]"⁵² To meet this initial threshold, what is required is "...merely an articulated statement of some

⁵⁰ Id at 232.

⁵¹FCC v. WOKO, Inc., 329 U.S. 223, 227 (1946).

^{52 47} U.S.C. § 309(d)(1).

fact or situation which would tend to show, if established at a hearing, that the grant of the license contravened public interest, convenience and necessity..."53

Secondly, if a prima facia showing is articulated, the Commission must next determine whether, "...on the basis of the application, the pleadings filed, or other matters which it may officially notice," "a substantial and material question of fact is presented." If there has been no substantial and material question of fact presented from such sources before the Commission, then no evidentiary hearing need be held. However, even though an evidentiary hearing may not be required, the Commission must thirdly make the ultimate factual determination of whether the public interest, convenience, and necessity will be served by granting the application. 55

For purposes of meeting the Commission's second determination, the Commission must weigh against the allegations of the *Petition*, the other evidence before it, including opposing affidavits filed pursuant to 309(d)(1). From all of those materials, the Commission must decide whether the ultimate questions of fact placed in issue (in this case the improper tying arrangements to retransmission consent and market power abuse) is "substantial" such that the "totality of the evidence arouses a sufficient doubt on the point that further inquiry is called for." ⁵⁶

⁵³ Federal Broadcasting System v. FCC (1955) 96 U.S. App. D.C. 260, 263, 225 F.2d 560, 563.

⁵⁴ 47 U.S.C. § 309(d)(2).

⁵⁵ Citizens for Jazz on WRVR, Inc. v. FCC (1985) 249 U.S. App. D.C. 342, 775 F.2d 392, 394.

⁵⁶ *Id* at 395.

While SCBA believes the application of Cap Cities has failed to meet its burden and should be denied, at the very minimum, SCBA has established sufficient doubt on the issues of market power abuse and retransmission consent tying arrangements as well as Cap Cities' lack of candor, squarely placing those issues before the Commission for further inquiry. By the standards articulated above, substantial and material questions of fact exist mandating an evidentiary hearing by the Commission so that a full investigation can be made if the Commission cannot otherwise deny the application without hearing.

V. CONCLUSION

For the foregoing reasons, the *Petition to Deny* must be granted as transfer of the licenses under the current merger agreement is not in the public interest. Although the Applicants can agree to modify their long-term conduct to avoid the public interest detriments, and such agreements need not be initiated by the Commission, to date the Applicants have made no efforts to initiate such discussions. Consequently, it appears the only resolution consistent with the Commission's statutory obligation is for it to deny the license transfers and SCBA respectfully requests that the applications be designated for hearing.

Respectfully submitted,

SMALL CABLE BUSINESS ASSOCIATION

Eric E. Breisach

Christopher C. Cinnamon

Frederick G. Hoffman

HOWARD & HOWARD

107 W. Michigan Avenue, Suite 400

Kalamazoo, Michigan 49007

Attorneys for Small Cable Business Association

EXHIBIT A

THREE YEAR AGREEMENT MONTHLY RETRANSMISSION FEES

•	FIRST YEAR	SECOND YEAR	THIRD YEAR
RATE CARD CHANNEL PLACEMENT	\$.24	\$.28	\$.32
(MUST-CARRY EQUIVALENT) TIMELY CONTRACT	(.02)	(.02)	(.02)
SIGNING; e.g. 8/1/93	(50.)	(.01)	4
MONTHLY FEE BEFORE QUANTITY DISCOUNTS	\$.20	\$.25	\$.30
NET FEES AFTER QUANTITY DISCOUNTS			
MINIMUM 1¢ MAXIMUM 6¢	.19 .14	.24 .19	. 29 . 24

QUANTITY DISCOUNTS

IF THE TOTAL NUMBER OF SUBSCRIBERS SERVED IN EIGHT MARKETS IS:	AMOUNT OF MONTHLY FEE REDUCTION PER SUBSCRIBER		
1 TO 249,999	\$.00		
250,000 TO 499,999	.01		
500,000 TO 749,999	.02		
750,000 TO 999,999	.03		
1,000,000 TO 1,199,999	.04		
1,200,000 TO 1,499,999	.05		
1,500,000 OR MORE	.06		

SIX YEAR AGREEMENT MONTHLY RETRANSMISSION FEES

	1ST YR	2ND YR	3RO YR	4TH YR	STH YR	6th Yr
MONTHLY FEE BEFORE QUANTITY DISCOUNTS						
THREE YEAR AGREEMT SIX YEAR AGREEMT	\$.20 .15	\$.25 .19	\$.30 .23	s .27	s .31	- \$.35

EXHIBIT B

Media's Alpha And Omega

s the editor of this newspeper, I am constantly struck by the alpha-and-omegalike forces that exist in business, largely because we cover so many overlapping in-

And last week, those differences become even more profound --- and somewhat personal — when our own parent company, Capital Cities/ABC, agreed to be acquired by the Walt Disney Co. in a \$19 billion transaction that overnight created the largest media company in the world.

That major announcement, not unexpectedly, prompted several wags to call me up, posing as Disney chairman Michael Eisner and barking orders like, "and don't forget about that page-one puff piece on The Disney Channel, or you can turn in your ears."

Putting aside all goofiness and breathlessness, Disney's acquisition of CapCities will obviously have major, but yet unknown, ramifications on the media landscape worldwide .

But as media titans around the plenet continue to size each other up for the mating rituals that loom on the not-so-distant horizon, let's not lose our heads and forget that business continues to go on in the tranches.

Just as significant as Disney buying CapCities or Westinghouse purchasing CBS are the stories that never find their way at all to The Wall Street Journal, let alone to page one.

Take our gatefold feature this

area of upstate New York.

Trust me: Rita Valentino, Auburn Cablevision's president and the first female chairperson of the New York State Cable Association, is probably totally unfazed by last week's sweeping, mega-media consolidation.

That's because she's too busy doing her own thing. Valentino is so energized by the process of upgrading her tiny cable system, which serves 14,300 subscribers --



investing \$3 million to ramp up to 750 megahertz with two-way capability - that she could probably care less who's at the top of the media totem pole by Wall Street's standards.

By mere serendipity, I found myself sitting next to her at the Rod Stewart concert at the CTAM show last month in San Francisco. We had never met before, but during the more quiet interludes of that deafening performance, we talked

and was not even affiliated with lobbying groups like CATA or the NCTA.

I was intrigued. So Multichannel News' new media editor Kent Gibbons flew up by turbo jet to interview her in person in Auburn last Monday, the very day Disney announced it would acquire CapCi-

Gibbons reports in this week's issue that Valentino's system is thriving. For example, in a world where major media companies are still just talking about "getting up on the net," Valentino is already providing Internet access to 250 of her subscribers in this remote area. of the country.

She's doing that not by experimenting with pricey cable moderns that don't quite work yet, like several major MSOs are doing, but by having her subscribers simply dial a phone number to computers at Auburn Cablevision's headend to access the net via the company's Flairnet service.

In fact, she's already had discussions with banks in the area to link the data systems in their branch offices. That goes the same for local schools in the area, which will work with Auburn to conduct distancelearning experiments.

While size generally translates into clout in the media world, we deliberately chose - as a counterpoint to other mega-media headlines in our own issue - to share with you, this week in particular, Valentino's very upbeat story.

It's a story of innovation and success that was not created by partnering up with a mega-media giant

ARP

week on tiny Auburn Cablevision, about what business was like for a small, independent operator nesher as an independent operator tled in the quaint Finger Lakes one who managed only one system to pull it all off. ... IS THE RISK ... AS A RESULT MY PRIMARY Yes in You of fewer OF MCRGCRS. IN THE CONCERN WITH THIS **VOICES IN** etc... ANY FRONT TeleOM BILL... THE MEDIA ... QUESTIONS?

Cath Singler (21th mill-4502 Loan Migrae 12120 ME-8484 Caretyn Gibson (300, 300-744 BEE. Shown Green (212) 007-4654 38. W F

FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of)	
)	
Implementation of Cable Act Reform Provisions)	CS Docket No. 96-85
of the Telecommunications Act of 1996)	
	``	

COMMENTS OF THE SMALL CABLE BUSINESS ASSOCIATION

Eric E. Breisach Christopher C. Cinnamon Kim D. Crooks Howard & Howard 107 W. Michigan Ave., Suite 400 Kalamazoo, Michigan 49007 (616) 382-9711

Attorneys for the Small Cable Business Association

TABLE OF CONTENTS

SUM	MARY							
I.	INTR	ODUC'	TION					
II.	THE	COMM	ISSION MUST COMPLY WITH THE					
	SMA	LL BUS	SINESS ACT WHEN ESTABLISHING					
	SUBS	CRIBE	ER MEASURE AND AFFILIATION					
	STAN	NDARD	OS THAT DEFINE A "SMALL CABLE COMPANY" 2					
	A.	The C	Commission Attempts to Define a Small Company in					
			Rulemaking					
	B.	The S	The Small Business Act Applies to This Proceeding 2					
	C.		The Commission must Seek Approval of Size Standards					
		from	the Administrator of the Small Business Administration 4					
Ш.	THE	COMM	IISSION MUST CAREFULLY TAILOR THE DEFINITION					
	OF "S	SMALL	CABLE OPERATOR" TO AVOID BARRING ACCESS					
	TO C	APITA	L MARKETS					
	A.	An O	ver-restrictive Definition of a "Small Cable					
		Com	pany" Will Destroy the Benefits Intended by Congress 5					
	B.	The (Commission must Apply the Subscriber Cap in a					
		Manr	ner That Creates Stability and Certainty 6					
		1.	The Initial 617,000 Subscriber Limit Must Establish					
			a Floor For Measures in Future Years					
		2.	Define "Subscriber" to Include Customers of All					
			Multichannel Video Programming Providers					
		3.	Subscribers, the Commission and Cable Companies					
			Benefit From Regulatory Certainty					
	C.		panies That Grow Beyond 617,000 Subscribers					
		Shou	ald Be Afforded Transitional Regulatory Treatment 9					
		1.	Operators Should Not Face Rate Rollbacks, Only					
			Regulation of Future Increases.					
		2.	Transitional Rate Mechanisms Avoid					
			Destabilizing Uncertainty and Avoid Creating					
			a Disincentive to Growth					
		3.	Transitional Regulation is Essential for Companies					
			Growing at the Same Rate as the Industry					
	D.		Overly Broad Definition of Affiliation Will Seriously					
		Rest	rict Small Cable's Access to Capital					
		1.	The Act's Definition of "Affiliate" Does Not					
			Govern Affiliations for Purposes of Title VI 1					
		2.	The Commission must Consider the Impact on					
			Access to Capital					

		The Commission must Distinguish Between	
		Active and Passive Interests	13
		4. Active Investments Should Constitute an	
		"Affiliation" Only above 50% or When	
		De Facto or De Jure Control Exists	17
	E.	When an Affiliation Exists, the Commission must	
		Exercise Care to Measure Only Relevant Revenues	
		to Avoid Unnecessarily Foreclosing Access to Capital	19
		1. The Commission's Proposed Definition of Gross	
		Revenues Is Appropriate	20
		2. The Act Does Not Require Aggregation of	
		Affiliate Revenue.	21
		3. The Act Excludes Revenues of the Cable Operator	
		from the Gross Revenue Accumulation	23
		4. Qualification of Related Entities Should Be Determined	
		on an Entity by Entity Basis.	25
IV.	FRAN	NCHISE SIZE, NOT SYSTEM SIZE, IS THE RELEVANT	
	UNIT	OF MEASURE TO IDENTIFY AREAS IN WHICH	
	REGI	ULATORY RELIEF MAY BE AVAILABLE	26
V.		EGULATION PROCEDURES: THE COMMISSION	
		ULD ADOPT STREAMLINED CERTIFICATION	
	PRO	CEDURES	26
	A .	Small Systems That Were Basic Only Systems as of	
		December 31, 1994 Are Deregulated.	27
	В.	Certification Procedures Should Be Streamlined and	
		Include Protection from Unreasonable Information Requests :	27
		A Simple Declaration Initiates the Procedure	27
		2. LFAs Must Decide Within 60 Days	
		Against Unreasonable Information Requests	28
		4. The Procedure Shall Also Apply in Cases Involving	
		Proposed CPST Complaints.	29
	C .	The Procedures Should Apply to All Certifications of	
		Small Cable Company Status.	29
VI.	EFFE	ECTIVE COMPETITION: THE COMMISSION SHOULD	
	RET.	AIN ITS CURRENT DEFINITION OF	
	"COI	MPARABLE PROGRAMMING"	
	A.	Comparison of Definitions of Comparable Program	
	В.	The Commission Should Not Adopt the Interim Definition	31
	C.	A Slight Modification of the Existing Definition Will	
		Efficiently Effectuate the Act	32

VII.	CABLE-TELCO BUYOUTS: SMALL CABLE NEEDS	
	SPECIFIC WAIVER PRESUMPTIONS AND PROCEDURES	33
	A. The Commission Should Specify That the Income Limit	
	in Section 652(d)(5) Does Not Include Affiliate Income	33
	B. The Commission Should Establish Presumptions and	
	Expedited Procedures for Small Cable Company Waivers	35
VIII.	TECHNICAL REQUIREMENTS: COMMISSION	
	REGULATIONS SHOULD CLARIFY THAT LFAS CAN	
	NO LONGER MANDATE SPECIFIC SYSTEM TECHNOLOGY	37
	A. The Commission Can Readily Reconcile Section 301(e) with	
	Other Provisions of the Communications Act	37
	B. Reconciling Franchise Renewal and Grant Provisions.	38
IX.	OTHER MATTERS: DEREGULATED SMALL CABLE	
	COMPANIES SHOULD NOT BE SUBJECT TO THE	
	UNIFORM RATE REQUIREMENT	40
X.	CONCLUSION	41

- SUMMARY

Following the lead of this Commission last year, Congress incorporated sweeping new provisions to liberate many small cable operators from onerous regulation imposed by the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Although Congress established broad classifications of small systems and small cable operators, it has left to the Commission to determine many specific parameters. The Small Cable Business Association ("SCBA") submits these comments to assist the Commission in closely examining the impact on small cable of various possible courses of action.

Small Business Act Compliance

SCBA encourages the Commission to consult with and seek the approval of the Administrator of the Small Business Administration as required under the Small Business Act. The regulations governing company size limitations and affiliations all define a "small business" and therefore require Small Business Administration approval.

Small Cable Definitions

Small cable's ability to access capital markets has always been a key factor with the Commission when it crafted regulatory provisions for small cable. If not carefully defined, the Commission could make the ability to access capital markets and to receive reduced regulatory burdens mutually exclusive. Such definitions run contrary to the liberating intent of both the Commission and Congress. Although the Commission asks for input on a variety of information, the affiliation and gross revenue provisions are key to promulgation of meaningful implementation rules.

♦ Company Size Cap

- The company size cap of 617,000 must establish an initial floor that allows qualified companies to retain qualification even if the total number of national <u>cable</u> subscribers decreases.
- In the alternative, the subscribers to all multichannel video programming providers could determine the size of the company cap.
- Companies that outgrow the subscriber cap should not face rate rollbacks, but rather have their rate increases subject to regulation.

♦ Determining Affiliations

- Classify investments as either passive or active based on the historical involvement of the investor in cable system operations.
- Passive investments should never give rise to an affiliation, regardless of the ownership percentage.
- Active investments should constitute an affiliation only if the investor has more than 50% voting control or exercises de jure or de facto control.

♦ Measuring Gross Revenues Of Affiliates

- The Act does not require aggregation of affiliate revenues.
- The Act excludes the gross revenue of the operator. If the Commission includes this revenue, it will preclude companies with more than 250,000 subscribers from use of the provisions Congress intended for companies with up to 617,000 subscribers.

♦ Measuring Franchise Size

- The franchise is the relevant area of measure to determine qualification for small cable relief.
- The equivalent basic subscriber is the relevant unit of measure to ensure consistency with other Commission measures.

Effective Competition

The Commission's new requirement that comparable programming will require provision of local off-air programs not only severely restricts the statutory provision, but will make it virtually impossible for small cable to efficiently ascertain whether programming is "comparable."

Cable-Telco Buy-Outs/Joint Ventures

The Commission should establish procedures and presumptions to facilitate joint ventures and buy-outs involving small cable. The costs of providing telecommunications services to rural areas is high. In some cases, joint ventures or buy-outs will facilitate the delivery of new telecommunications services to rural areas. Without guidelines and favorable presumptions to create certainty around the waiver process, most smaller entities will be unwilling to expend the time and high cost of seeking such waivers. The Commission should make the opportunity to encourage such combinations where they serve the public interest.

Other Implementation Issues

- ♦ Technical Requirements. Local franchising authorities should no longer mandate specific system technologies.
- ♦ Prior Year Losses. Provisions governing the recovery of prior year losses should not limit the scope of loss recovery on Form 1230.
- Uniform Rates. Deregulated small cable systems should not be subject to the uniform rate requirement.

FEDERAL COMMUNICATIONS COMMISSION Washington, D.C. 20554

In the Matter of)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996)	CS Docket No. 96-85
)	

COMMENTS OF THE SMALL CABLE BUSINESS ASSOCIATION

I. INTRODUCTION

The Small Cable Business Association ("SCBA"), through counsel, files these comments to assist the Commission in its consideration of crucial regulation implementing the provisions of the Telecommunications Act of 1996 ("Act") relating to small cable systems and small cable companies. SCBA is well known to the Commission as a participant and small cable advocate over the past three years in most rulemaking proceedings implementing the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act").

SCBA grew from a grass-roots effort by small operators to cope with the burdens imposed by the Commission's implementation of the 1992 Cable Act. From the meeting of small operators in May 1993 where SCBA was spontaneously formed, SCBA has grown into a proactive force, currently having over 350 members.